In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-51

YELLOWSTONE PARK LINES, INC., ET AL., PETITIONERS

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 478 F. 2d 285. The findings of fact of the district court (Pet. App. B) and the summary judgment of that court (Pet. App. A) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1973. The petition for a writ of certiorari was filed on July 3, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

521-187

QUESTION PRESENTED

Whether petitioners' enterprise in Yellowstone National Park consisting of numerous physically distinct and widely scattered places of business—including hotels, inns, motels, lodges, cabins and restaurants—is a single "amusement or recreational establishment" within the exemption provided by Section 13(a)(3) of the Fair Labor Standards Act, 29 U.S.C. 213(a)(3).

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, are set forth in the petition (Pet. 3–4) and in its appendix (Pet. App. D).

STATEMENT

This action was brought by the Secretary of Labor to enjoin petitioners from violating the Act's minimum wage, overtime and recordkeeping requirements with respect to certain employees working at petitioners' facilities at Yellowstone National Park. Petitioners stipulated that their business is an "enterprise" within the Act's coverage and that their employees have not been paid the minimum wages required by the Act (R. 179–180).[1] However, petitioners claimed that they have a single "establishment" in the park and that their employees are "employed by an establishment which is an amusement or recreational establishment" and, thus, exempt under Section 13(a)(3), 29 U.S.C. 213(a)(3) (R. 181).

[1] "R." refers to the record filed in the court of appeals.

Pursuant to an agreement with the National Park Service, petitioners operate as one of several concessioners within the park, where they maintain hotels, inns, lodges, cabins and restaurants (R. 169, 240–241). These facilities are located at such widely separated points as Mammoth Hot Springs, Old Faithful, Yellowstone Lake and Canyon Village, and they vary substantially in individual size and available features.[2] The employees work under a company employment agreement but are primarily attached to a single facility with an on-site manager (R. 205).

The Secretary conceded that all of petitioners' 2,300–2,500 employees in the park, except approximately 200 central employees, were exempt under Section 13(a)(3). The 200 central employees perform functions which serve several, or all, of the companies' establishments at the various locations throughout the park. They include: (1) central accounting office employees (R. 39, 46–48); (2) manager's office employees (R. 48–50); (3) reservations office employees (R. 48–50); (4) advertising and promotion office employees (R. 48–50); (5) laundry employees (R. 40, 51–52); (6) print shop employees (R. 40, 52–53); (7) personnel office employees (R. 40, 54–55); (8) warehouse employees (R. 40, 54–55); (9) garage employees (R. 40, 54–55); (10) ice manufacturing plant employees

[2] For example, the facilities at Mammoth Hot Springs are located approximately 51 miles from the facilities at Old Faithful; the facilities at West Thumb near Yellowstone Lake are located approximately 68 miles from Mammoth; and the facilities at Roosevelt Lodge on the Yellowstone River are about 60 miles from the Old Faithful facilities and some 56 miles from the facilities at West Thumb (R. 169).

(R. 29, 40); (11) central fire watch employees (R. 56–57); and (12) central maintenance and repair workers who perform functions which serve several or all of the companies' establishments in the park (R. 51, 60–61). The Secretary contended that since these central employees are not employed by any specific establishment, but rather by the entire enterprise, they would be exempt only if all of petitioners' facilities throughout the park constitute a single "establishment."

The district court sustained petitioners' motion for summary judgment and dismissed the complaint (R. 247–248). The court of appeals reversed, holding that the word "establishment" as used in the Act means "a distinct physical place of business rather than an integrated business or enterprise" (Pet. App. c7), and that "the distances and the heterogeneous nature of the areas of interest do not lend to the Yellowstone Park enterprises being considered as one integrated unit subject to exemption under § 13(a)(3)" (*id.* at c10).

ARGUMENT

The decision below is correct, does not conflict with any decision of another court of appeals and does not present any issue warranting review by this Court.

1. As the opinion of the court of appeals emphasizes, the meaning of the term "establishment" in the Fair Labor Standards Act was settled by this Court 28 years ago in *Phillips Co.* v. *Walling,* 324 U.S. 490. There a chain enterprise, consisting of 49 grocery stores and a separate warehouse and central office building, claimed to be a "retail establishment" ex-

empt from the Act under Section 13(a)(2), 29 U.S.C. 213(a)(2). This Court rejected the claim, holding that "Congress used the word 'establishment' * * * as meaning a distinct physical place of business," not "an entire business or enterprise" (324 U.S. at 496). Accord, *Mitchell* v. *Bekins Van & Storage Co.*, 352 U.S. 1027.[3]

The courts of appeals have repeatedly held that multi-unit enterprises do not constitute a single "retail establishment" exempt from the requirements of the Act. See, *e.g.*, *Shultz* v. *Adair's Cafeterias, Inc.*, 420 F. 2d 390, 393–395 (C.A. 10); *Shultz* v. *Kip's Big Boy, Inc.*, 431 F. 2d 530, 535 (C.A. 5); *Mitchell* v. *Sunshine Department Stores, Inc.*, 292 F. 2d 645, 647–648 (C.A. 5); *Mitchell* v. *Birkett*, 286 F. 2d 474, 476–477 (C.A. 8); *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766, 769 (C.A. 8); *Fred Wolferman, Inc.* v. *Gustafson*, 169 F. 2d 759, 761 (C.A. 8); *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475, 477–478 (C.A. 7), certiorari denied, 328 U.S. 854; *Mitchell* v. *E. G. Shinner and Company*, 221 F. 2d 260, 262 (C.A. 7); and *cf. Wirtz* v. *Keystone Readers Service, Inc.*, 418 F. 2d 249, 254 (C.A. 5).

[3] In *Bekins Van & Storage Co.*, the Court referred to an excerpt from the legislative history of the 1949 Amendments to the Act (63 Stat. 917) specifically approving the *Phillips* definition of the term "establishment." In the excerpt referred to by the Court, Senator George had stated that "the word 'establishment' has been very well defined in the Wage and Hour Act. It means now a single physically separate place of business * * * and it does not mean an entire business enterprise." 95 Cong. Rec. 12579. See also, the Reports of both the House and Senate at 95 Cong. Rec. 14877, 14932, and Senator Holland's remarks at 95 Cong. Rec. 12505.

While these decisions construed the term "establishment" in the "retail establishment" exemption, Section 13(a)(2), 29 U.S.C. 213(a)(2), they are controlling in construing that term in Section 13(a)(3), 29 U.S.C. 213(a)(3). Prior to the Fair Labor Standards Amendments of 1966 (80 Stat. 830), Section 13(a)(2) exempted from the Act's requirements "any employee employed by any retail * * * establishment * * * if such establishment—* * * (ii) * * * is an amusement or recreational establishment that operates on a seasonal basis * * *" (75 Stat. 71). See S. Rep. No. 145, 87th Cong., 1st Sess. The 1966 Amendments deleted this provision, and gave the amusement and recreational establishment exemption independent status in Section 13(a)(3); the amendments also added two specific tests of seasonal operation. But nowhere in the legislative history of the 1966 Amendments is there any indication that Congress intended the word "establishment" to have a broader meaning in Section 13(a)(3) than the well settled definition which it had under Section 13(a)(2).

2. Contrary to petitioners' assertion (Pet. 7), there is no conflict among the circuits as to the meaning of the word "establishment." Petitioners' main contention, that the decision of the court below conflicts with the Fifth Circuit's decision in *Hodgson* v. *Hasam Realty Corp.*, 442 F.2d 1336 (C.A. 5), affirming *per curiam sub nom. Shultz* v. *Hasam Realty Corp.*, 316 F. Supp. 1136 (S. D. Fla.), overlooks the substantially different factual circumstances of that case. In *Hasam*, a five-unit resort hotel complex was held to be a single

"establishment" whose central employees were exempt under Section 13(b)(8), 29 U.S.C. 213(b)(8), of almost 3,500 square miles (R. 169). Between these employees of "an establishment which is a hotel, motel, or restaurant." Not only were all of the *Hasam* facilities a functional, cohesive unit operating under the common name "Diplomat," but four of them were contiguously located on a relatively small parcel of land owned entirely by the corporate enterprise, and were separated only by a road or an inland waterway.[4] In contrast, the various facilities operated by petitioners are located in widely separated areas of a publicly owned and maintained national park consisting of almost 3,500 square miles (R. 169). Between these facilities lie hundreds of square miles of national park land which the companies do not own, lease or in any way utilize or control. Indeed, the only physical connection which these facilities share is their location in the same vast national park.

Nor is there any merit to petitioners' claim (Pet. 12) that the decision below conflicts with those of the Sixth, Seventh and Eighth Circuits in *McComb* v. *W. E. Wright Co.*, 168 F.2d 40 (C.A. 6); *Walling* v. *Goldblatt Bros.*, 152 F.2d 475 (C.A. 7); *Fred Wolfer-*

[4] The decision in *Hasam* was based on Section 779.305 of the Department's Interpretative Bulletin concerning retailers of goods and services (29 C.F.R. 779.305). That section sets forth three tests for determining whether various portions of a business constitute a single establishment or separate establishments: (1) physical separation; (2) functional integration; and (3) interchange of employees. These tests have no pertinence here, since their application is expressly limited to situations where "retailing and other functionally unrelated activities [are] performed *on the same premises*" (emphasis added).

man, Inc. v. *Gustafson,* 169 F.2d 759 (C.A. 8); and *McComb* v. *Wyandotte Furniture Co.,* 169 F.2d 766 (C.A. 8). In those cases, the courts denied "retail establishment" exemptions to non-retail units of multi-unit retail enterprises on the ground that the units did not perform a "retail" function. These decisions in no way conflict with the holding below that petitioners' physically distinct places of business constitute separate establishments.

3. Although petitioners now seek review of the question whether employees who perform services for more than one recreational establishment are exempt under Section 13(a)(3) of the Act, this point was not before the courts below. As the court of appeals pointed out, "[t]he parties have stipulated that the plaintiff is entitled to an injunction * * * if it prevails on the question of what constitutes an establishment for purposes of § 13(a)(3) of the Act" (Pet. App. c10; R. 181). In view of this stipulation, petitioners are precluded from raising the question now. *Safeway Stores* v. *Oklahoma Grocers,* 360 U.S. 334, 342, n. 7; *Walters* v. *City of St. Louis,* 347 U.S. 231, 233; *United States* v. *New York Tel. Co.,* 326 U.S .638, 650–651, n. 18.

In any event, the central employees, even those who are physically located in a single "establishment," are not employed "*by* * * * an amusement or recreational establishment" (Section 13(a)(3), 29 U.S.C. 213(a)(3)). In *Mitchell* v. *Kroger Company,* 248 F. 2d 935, 940 (C.A. 8), the court, speaking of traveling auditors who made audits at their employer's chain of retail

stores, said that the "[retail establishment] exemption * * * does not include those who happen to be engaged at but not 'employed by' an exempt retail establishment, even though perchance they might perform their functions literally inside the exempt establishment." Like the auditors in *Kroger*, the central employees here are "functionally related to the entire business of the [enterprise], regardless of the fact that their services are performed mainly inside [the exempt establishments]" (*id.* at 941). Plainly, therefore, the central employees are not exempt under Section 13(a)(3).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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